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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

**IN RE AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS ON MAY 25, 1979**

**INGE MARIA KAHL, Special Administrator of the Estate of HANS JURGEN KAHL, deceased, et al.,**

*Petitioners,*

vs.

**AMERICAN AIRLINES, INC. and McDONNELL DOUGLAS CORPORATION,**

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

Whether a judgment and opinion of the United States Court of Appeals for the Seventh Circuit should be permitted to stand in a Multidistrict Litigation case where that opinion is not only in conflict with the decisions of other Courts of Appeals on the same issues and is in conflict with the precise opinion of this Court which it states it is interpreting, but also where the opinion presents a serious challenge to the continuing vitality of a basic doctrine which has guided the federal judiciary for more than forty years—*Erie Railroad Company v. Tompkins.*

## LISTING OF PARTIES SEEKING REVIEW IN THIS PETITION

Inge Maria Kahl, Special Administrator of the Estate of Hans Jurgen Kahl, deceased

State National Bank, Administrator of the Estate of Stephen P. Sutton, deceased

State National Bank, Administrator of the Estates of Christopher S. Sutton and Colin M. Sutton, deceased

Thomas Ziemba, Personal Representative of the Estate of Diane E. Ziemba and Jon J. Ziemba, deceased

Doris C. Udovich, Executor of the Estate of Alfred F. Udovich, deceased

Angeline J. DiCastro, Administrator of the Estate of Gail Anne DiCastro, deceased

Albert T. Ferntheil, Executor of the Estate of Carol Arnold Ferntheil, deceased

Dorothy B. Lang, Administrator de bonis non of the Estate of Susan Lang, deceased and Dorothy B. Lang, Administrator with the will annexed of the Estate of E. Stephen Lang, deceased

Sharon Fink, Administrator of the Estate of Larry M. Fink, deceased

Peter Adduci, Administrator of the Estate of Kathleen Adduci, deceased

Kenneth L. Sheetz, Administrator of the Estate of Dennis T. Connell, deceased

Gayle V. Gallagher, Administrator of the Estate of Kathleen V. Gallagher, deceased

Sandra Leigh Cannon, Administratrix of the Estate of Robert Lamar Cannon, deceased

Martin H. Malek, Administrator of the Estate of Doreen L. Malek, deceased

Culver J. Vickery, Administrator of the Estate of Martha J. Vickery, deceased

Margaret Clark and Richard Davis, Co-Administrators of the Estate of Patricia Clark Davis, deceased

Richard J. Moruzi, Administrator of the Estate of Debra A. Moruzi, deceased

State National Bank, Administrator of the Estates of Christopher S. Sutton and Colin M. Sutton, deceased

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In The

# Supreme Court of the United States

October Term, 1982

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 701 F.2d 1189 (7th Cir. 1983).

## JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1) from the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on February 15, 1983. (A copy of that decision is attached hereto as Appendix A.) A petition for rehearing and suggestion for rehearing en banc was timely filed and was denied on March 31, 1983. (A copy of the order denying that petition is attached hereto as Appendix B.)

## STATEMENT OF THE CASE

On May 25, 1979, a DC-10 airliner built by McDonnell Douglas Corporation and owned and operated by American Airlines crashed almost immediately after takeoff from O'Hare International Airport outside Chicago, Illinois. The crash took the lives of 273 persons.

Shortly after the fatal crash, Inge Maria Kahl, as Special Administrator of the Estate of Hans Jurgen Kahl, Deceased, filed suit in the Circuit Court of Cook County, Illinois. This first suit arising from the crash, and many others filed in the Circuit Court of Cook County, Illinois (the Illinois court located in Chicago and having jurisdiction over the site of the crash), were removed to the United States District Court for the Northern District of Illinois by defendants. This case, and numerous others filed either in the state courts and later removed or filed directly in federal court after the first cases had already been removed to the federal court system (approximately 150 cases in all), were consolidated for pretrial proceedings in the United States District Court for the Northern District of Illinois by order of the Judicial Panel on Multidistrict Litigation. (*In re Air Crash Disaster*, 476 F.Supp. 445, 449 (J.P.M.D.L. 1979).

After it had previously been decided that the substantive law of Illinois (as set forth in the Illinois Wrongful Death Act)[1] would apply in these cases (*In re Air Crash Disaster*, 644 F.2d 633, 637 (7th Cir. 1981)), certain motions *in limine* were filed before the district court seeking to determine whether a federal court sitting in diversity would admit evidence of income tax liability the decedent would have incurred on the earnings lost because of premature death and, also, whether the court would instruct the jury that whatever award it made would not be subject to federal income tax in the hands of the survivors. The district court, applying Illinois law under *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), determined that the Illinois courts would not permit the

[1] Ill.Rev.Stat., Ch. 70, §1-2.2 (1981).

introduction of evidence of income tax liability on the part of the decedent nor would they instruct the jury that the award itself would not be subject to federal income taxation. (*In re Air Crash Disaster*, 526 F.Supp. 226 (N.D. Ill. 1981).) The court then concluded that it was bound to and would follow the Illinois courts in these matters.

Granting interlocutory appeal from the district court's ruling on the motions *in limine*, the Seventh Circuit reversed the lower court's ruling on both issues. With regard to the question of the admissibility of evidence of the federal income tax which would have been paid by the decedent but for the untimely death, the Court of Appeals stated that the Illinois courts might admit such evidence, doing so by questioning the basis for, and underlying reasoning of, the decisions of the Illinois courts which had previously rejected this evidence. Turning next to the question of the jury instructions, the Seventh Circuit declined to accept the decisions of several intermediate Illinois reviewing courts which had both specifically rejected the giving of such an instruction and confirmed the continuing vitality of prior decisions of the Illinois Supreme Court to this effect. The Court of Appeals justified this refusal to conform to the existing Illinois practice by again questioning the rationale upon which the Illinois court system had held it would not permit these instructions and, further, by questioning whether the giving of this instruction was controlled by the application of Illinois law under *Erie*.

## REASONS FOR GRANTING THE WRIT

**THE WRIT OF CERTIORARI SHOULD BE ALLOWED BECAUSE THE COURT OF APPEALS IS IN ERROR IN APPLYING *NORFOLK & WESTERN RAILWAY v. LIEPELT*, AND IS CONTRARY TO THE INTERPRETATION OF THE *LIEPELT* DECISION BY SEVERAL OTHER COURTS OF APPEAL; AND THE OPINION CHALLENGES THE CONTINUING VITALITY OF THE DECISION OF THIS COURT IN *ERIE RAILROAD COMPANY v. TOMPKINS*.**

In *Norfolk & Western Railway v. Liepelt*, 444 U.S. 490 (1980), this Court decided that in cases brought under the Federal Employers' Liability Act (FELA), state courts could not prohibit either the admission of evidence as to the income tax liability of a decedent or the giving of an instruction that the proceeds of the jury award to the survivors would be exempt from federal taxation. This Court reached this decision as a "matter governed by federal law", noting that one of the purposes of the FELA was to create uniformity throughout the United States with respect to "railroads' financial responsibility for injuries to their employees." (444 U.S. at 493.)

Prior to the *Liepelt* decision, courts in FELA cases had considered the matters of admission of evidence of this type and jury instructions to be procedural in nature. Therefore, the determination to admit such evidence or permit this type of instruction was governed by the applicable rules of the forum in which the case was being tried. However, recognizing that the question of the measure of damages in a FELA action was "federal" in character and that Congress intended to provide for uniformity throughout the United States with regard to the railroads' financial liability for its employees job-

related injuries, this Court in *Liepelt* held that since the admission of this evidence, and the giving of this instruction, were of such significant impact upon the measure of damages ultimately reached by a jury, a state court could not be permitted to treat these issues as "procedural". Instead, the state courts were required to allow such evidence and give this instruction as a matter of federal law in FELA cases.

The Court's resolution of these issues in *Liepelt* just as clearly governs the determination of these same issues for the purpose of diversity jurisdiction. Having already determined that the admissibility of this type of evidence, and the giving of this type of instruction, has a significant and substantial impact upon the measure of damages ultimately determined by a jury in a death action brought under the FELA, it follows that the same impact would be had in a wrongful death action brought under state law. Therefore, a federal court hearing a wrongful death action under its diversity jurisdiction would be required to apply the appropriate state law governing the admissibility of this type of evidence and the giving of appropriate instructions.

Petitioners submit that this view of the reasoning underlying the *Liepelt* decision, and the determination that these matters are of such impact that they have a substantial and controlling effect upon the eventual outcome of a proceeding, is compelled not simply by the decision itself. Where these questions have been considered by other Courts of Appeals in diversity cases subsequent to *Liepelt*, this reasoning has been adopted to require the district courts to apply existing state law.

In *Spinosa v. International Harvester Co.*, 621 F.2d 1154 (1st Cir. 1980), the Court of Appeals held that the

*Liepelt* case did not "mandate an across-the-board change in the majority rule regarding computation of a decedent's projected future earnings" in a diversity situation, particularly where the decision in *Liepelt* was said to stand "against a mountain of contrary state authority (*circa* 28 states do not consider tax impacts)." (621 F.2d at 1158-1159.) (See also, *Vasina v. Grumman Corp.*, 644 F.2d 112, 118 (2d Cir. 1981).) As the Fifth Circuit commented in *Fenasci v. Travelers Insurance Co.*, 642 F.2d 986, 989 (5th Cir. 1981), the *Liepelt* decision was based on the federal nature of the action being tried in state court and was "strictly limited in application to federal law, whereas, in this case we are dealing with state law and are bound under *Erie* to apply it."

Although the *Spinosa*, *Vasina*, and *Fenasci* opinions reflect that the majority of courts which have considered this Court's opinion in *Liepelt* have recognized that it was entered as a matter of federal law and required the admission of this evidence and the giving of this instruction in a FELA case due to their substantial and determinative effect upon the outcome of a proceeding brought under federal law, the opinion of the Seventh Circuit in this case not only disagrees with its sister circuits but also contradicts the clear basis upon which this Court reached its decision in *Liepelt*.

The opinion below, although stating that it finds that Illinois' substantive measure of damages is "identical to the FELA measure" (App. 8), the Court of Appeals concluded that while certain Illinois decisions would "appear" to prohibit the admissibility of evidence of a decedent's tax liability, the federal rules of evidence would "displace any similar state rule in federal court" and held that any Illinois decisions to the contrary would not "bind the district court in this case." (App. 15).

In a like fashion, the Seventh Circuit agreed "that, although Illinois courts very likely would not instruct the jury that any damages it awarded would be non-taxable, the Illinois practice does not bind the federal courts under *Erie* because, as far as we can determine from the cases, Illinois' concerns are either procedural or based on a mistaken view of federal law." (App. 19).

The opinion of the Seventh Circuit that the district court "may admit all evidence relevant to [damages], subject to the considerations of" the Federal Rules of Evidence, (App. 8) and that the fact that an Illinois court would not instruct the jury that any damages it awarded would be non-taxable did not bind a federal court to follow this practice under *Erie*, is patently erroneous. As set forth above, and as recognized by the Seventh Circuit itself in its opinion which acknowledged the "most appealing argument that admissibility rules are tied to the substantive law [by] an analogy to *Liepelt* itself, which required state courts to apply a federal admissibility rule when adjudicating a federal claim" (App. 7), the admission of this evidence so clearly has a substantive effect upon the outcome of an amount of damages awarded that the state law may not be disregarded and the federal rules as to the admissibility of evidence substituted as a basis for governing admissibility. Since the Illinois courts have never, nor does the opinion in this case reflect that they are likely to admit such evidence in a proceeding brought under Illinois law—upon which these cases are to be tried under *Erie* principles—the opinion of the Seventh Circuit may not stand.

The Illinois Supreme Court in *Hall v. Chicago & N.W. Ry. Co.*, 5 Ill. 2d 135, 125 N.E. 2d 77 (1955), decided that the Illinois courts would not permit income tax consequences to be interjected into a proceeding tried before

the state courts. This view, and indeed the *Hall* decision itself, has been cited on numerous occasions as one of the leading authorities establishing the "majority rule" adopted throughout the United States prohibiting either the introduction of this type of evidence or the giving of such an instruction. (See, *Propriety of Taking Income Tax into Consideration in Fixing Damages in Personal Injury or Death Actions*, 63 A.L.R.2d 1378 (1959). See also, *Lousissaint v. Hudson Waterways Corp.*, 443 N.Y.S. 678, 111 Misc. 2d 122 (1981).)

Although the *Hall* decision pre-dates the decision of this Court in *Liepelt*, the continuing vitality of the *Hall* decision has been recognized by the Illinois courts in numerous decisions which have questioned whether this Court's decision in *Liepelt* would affect Illinois practice in this area. In *Johnson v. Hoover Water Well Service, Inc.*, 108 Ill. App. 3d 994, 439 N.E. 2d 1284 (1982), the court noted that the *Liepelt* decision would overrule previous Illinois decisions with regard to FELA cases tried within the state court system. However, the court specifically found that "the *Liepelt* decision does not, and could not, change the Illinois rule in purely state matters where, as here, no federal issues are involved. We, therefore, find *Hall* and *Raines* [*Raines v. New York Central Ry. Co.*, 51 Ill. 2d 428 (1972)] still controlling here." (439 N.E. 2d at 1295.)

The decisions of the Illinois Supreme Court which the Seventh Circuit recognizes as a possible basis for finding that the Illinois Supreme Court would *not* permit the admission of such evidence (App. 15), as well as the numerous post-*Liepelt* state appellate court cases dealing with these same issues, may not be brushed aside by stating that application of federal standards should "displace any similar state rule in federal court." The admissibility of this evidence and the effect of this instruction is so

overwhelmingly "outcome determinative" that petitioners submit that to allow the opinion in the instant case to stand is tantamount to reversing the basis upon which the *Liepelt* opinion was decided. These questions should be resolved pursuant to the clearly existing Illinois practice and neither the evidence nor the instruction permitted.

Petitioners also respectfully submit, however, that it is quite evident that the Seventh Circuit in its opinion was well aware that an Illinois court would *not* permit the admission of this type of evidence, nor give a jury this instruction. Rather, it was decided to permit the district court to act to the contrary here because the Court of Appeals disagreed with the existing application of Illinois law. In doing so, and by holding that a federal court is *not* bound to follow state law in a diversity case, the opinion is not simply wrong. It threatens the entire structure upon which the federal court system is based.

The fact that the Court of Appeals declined to be bound by the "erroneous" decisions of the Illinois courts as to their own law permeates the decision here. While ostensibly deciding that it was free to apply federal law in the "absence" of any Illinois Supreme Court decision as to the admissibility of evidence of hypothetical tax liability in a wrongful death case, the Court acknowledged that the decision of the Illinois Supreme Court in *Hall v. Chicago & Northwestern Railway* would have excluded such evidence and "may still represent the view the court would favor on questions of Illinois law." (App. 9). The Court of Appeals then disposed of the possible conflict with the *Hall* case by stating that the reasoning there was "less than compelling" for various reasons including that the Illinois courts' adoption of the "majority view" with regard to the admissibility of such

evidence "may" have been eroded, that the Illinois court's interpretation of federal law was "wrong", and that the "approval of the majority rule [in *Hall*] was dictum." (App. 9-10).

After questioning the reasoning underlying the *Hall* decision, and after declining to be bound by the more recent decision of the Illinois Supreme Court in *Elliott v. Willis*, 92 Ill. 2d 530 (1982) as well (App. 12-13), the opinion of the Court of Appeals noted that several Illinois Appellate Court decisions after *Liepelt* had confirmed the "continuing vitality" of the rules announced in *Hall* in actions based on state law. While acknowledging that these cases were "powerful evidence" of the content of Illinois law (App. 16), the Seventh Circuit decided that since Illinois did not have a "substantive interest" in refusing to give this instruction—"therefore, perhaps federal law should control." (App. 16-17). The opinion concluded its discussion by again dissecting the reasoning of the *Hall* decision and stating that the "rationales for refusing to instruct the jury on this issue" should not "bind a federal court because they speak to matters of court administration, about which the federal courts have independent competence." (App. 17-19).

Under *Erie*, however, a federal court is not free to disregard the substantive law of a jurisdiction simply because it disagrees with the reasoning or rationale underlying that law. As Professor Wright noted in his discussion of the *Erie* doctrine, even the decision of an intermediate state appellate court may not be disregarded "simply because the federal court finds it unsound". These intermediate decisions may *only* be questioned if the "federal court is convinced by other persuasive data that the highest court of the state would decide otherwise." (Wright, Miller & Cooper, *Federal Practice and Procedure*, Ch. 14, Section 4507, p. 95.)

This view has heretofore been uniformly accepted by the federal court system:

> "In determining the law of the state, federal courts must follow the decisions of the state's highest court, and in the absence of such decisions on an issue, must adhere to the decisions of the state's intermediate appellate courts unless there is some persuasive indication that the state's highest court would decide the issue otherwise. See, *West v. American Telephone and Telegraph*, 311 U.S. 23 (1940); *Allen v. A.G. Edward & Sons, Inc.*, 606 F.2d 84, 87 (5th Cir. 1979); *Benante v. Allstate Insurance Company*, 477 F.2d 553, 554 (5th Cir. 1973)." (*Flintkote Co. v. Dravo Corporation*, 678 F.2d 942, 945 (11th Cir. 1982).)

The opinion of the Seventh Circuit here reflects little or no evidence that the courts of Illinois would or are about to change their long standing and clearly enunciated rules that would prohibit the admissibility of the evidence which the Court of Appeals will permit here and which clearly prohibit the giving of the instruction now approved. The Court of Appeals questioned the reasoning and rationale of the Illinois Supreme Court in *Hall* and *Elliott*, and declined to be bound by such "faulty" reasoning. The Court further acknowledged that several very recent decisions of the intermediate Illinois reviewing courts had reaffirmed the continuing vitality of the *Hall* decision in state law cases and refused to permit the type of instruction requested in this case.

In answer to this overwhelming evidence of the *actual* manner in which an Illinois court would have resolved these issues, the Court responded by questioning whether or not "*Erie* considerations work in reverse" and held that the decision of this court in *Liepelt*, which rested on the "overwhelming federal interest in uniformity of practice under FELA, and the supremacy clause [which]

gives the federal government power to impose even a procedural rule on state courts" would not permit a federal court to disregard a state court's determination of its own law if the "reasoning" or "rationale" by which that court system arrives at its rules are not "sound". Petitioners would urge that "*Erie* considerations" do indeed "work in reverse", as has already been determined by this Court!

In *Day & Zimmerman, Inc. v. Challnor, et al.*, 423 U.S. 3 (1975), this Court refused to abandon its "long standing decision in *Klaxon Company v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941)" in a case where the Fifth Circuit declined to apply the Texas choice-of-law rules based upon its own (the federal court's) determination that the State of Texas did not have sufficient "interest in the case" or any "policy at stake". (423 U.S. at 3-4.) In a *per curiam* opinion reversing the decision of the Fifth Circuit, this Court refused to permit a federal court in a diversity case to "engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the state in which the federal court sits." (423 U.S. at 4.)

The basis upon which this Court acted was clear and unequivocal: The federal court system is not to be permitted to question the basis of or the reasoning upon which a state court had decided its own law as "[o]therwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side." (*Id.*)

Just as the *Liepelt* decision was intended to provide for uniformity throughout the United States in actions brought under the FELA, the decision of this Court in *Erie* achieved the same uniformity of application of state law more than forty years ago. That doctrine, however, is

now threatened by the decision of the Seventh Circuit in the instant case which would bind a federal court to apply state law as interpreted by a state court system *only* where it finds that the state court system has interpreted its own laws "properly".

Once the federal courts are free to go behind the "reasoning" and the "interests" of a state court system in interpreting its laws, a second body of law and the method of application of state law will grow up alongside that of the existing state court system. Based then on the simple "accident of diversity of citizenship" the administration of justice will be disturbed when litigants file their cause of action in, or choose to have it removed to, the federal district court depending on which "interpretation" of state law is perceived to be advantageous in a given case. The situation in the cause which petitioners now seek to bring before this Court is a clear example of what will occur.

Under the *Erie* doctrine, a state rule should be applied in a diversity case if "it would have so important an effect upon the fortunes of one or both litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court." (*Hanna v. Plummer*, 380 U.S. 460, 468 (1965).) Considering the need to apply *Erie* on the question of the admissibility of evidence of taxation under state law in *Turcotte v. Ford Motor Company*, 494 F.2d 173 (1st Cir. 1974), the Court stated: "[I]f Rhode Island law required evidence of income taxes in computing wrongful death damages, yet the federal district court in Rhode Island barred such evidence in diversity cases, no rational plaintiff who had the choice would ever bring a wrongful death action in the state court. The difference in wrongful death recoveries between the two forums would be staggering. Therefore, under *Erie* state law must control." (494 F.2d at 185.)

The opinion of the Seventh Circuit in this case presents precisely the type of forum-shopping on a grand scale that *Erie* was intended to prevent—a determination reaffirmed in cases such as *Hanna v. Plummer* and *Day & Zimmerman, Inc. v. Challnor.*[2] By questioning the "reasoning" or underlying rationale of the Illinois court system's decisions as to its own law, the Court of Appeals has now created a situation where there will be virtually no uniformity of the administration of Illinois law since parties having their cases presented to a jury in the federal court house in Chicago will receive a far different treatment of their actions brought under the Illinois Wrongful Death Act than they would if their cases were being presented a few short blocks north of the federal court house in a state court proceeding. The accident of diversity of citizenship will now be the *sole* and *controlling* matter in the application of Illinois law.

Further, the opinion of the Seventh Circuit is not restricted simply to issues arising under the Illinois Wrongful Death Act or to just the laws of Illinois. If other federal courts are to adopt the justification for ignoring state law which has been approved by the Seventh Circuit in this case, virtually any body of state law may be brushed aside by a federal court if it chooses to question the validity of the state court system's interpretation of

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[2] Such "forum-shopping" has already taken place in this case. As soon as the Kahl pleading was filed, defendants moved to transfer this and virtually every other case filed in the state court system into the federal courts. Only where defendants had been added in order to defeat diversity were the removal attempts unsuccessful. Further, it may be noted that in five cases arising from this crash which *have* been tried in the California state court system, no evidence concerning income taxation was admitted nor was any jury instruction on income taxes given to the jury.

its own law. Litigants will then choose their forum (if they are fortunate enough to be permitted to do so by diversity of citizenship) based solely on what they perceive as the advantage offered by a federal court system, thereby returning *both* the state and federal court systems to the situation which existed prior to *Erie*.

Petitioners respectfully submit that this situation is neither necessary nor desirable either in this case or as precedent within either the federal or state court system. It is urged that the status of Illinois law is clear and convincing, and that the federal court system should be bound to apply that law regardless of its inclination to do otherwise.

## CONCLUSION

Petitioners do not challenge the decision of this Court in *Liepelt* as it requires courts throughout the United States to permit the introduction of certain evidence and the giving of certain jury instructions in actions arising under federal law. That decision is based upon and reaffirms the need for uniformity of application of federal law regardless of the type of court in which the case is being heard. In a like fashion, however, the decision of this Court in *Erie* has stood for more than forty years as controlling the practice of the federal courts in diversity cases. The *Erie* decision reflects the mandate of this Court that the parties before the federal courts be accorded uniformity of application of state law without the application being affected by the "accident" of diversity of citizenship.

Petitioners respectfully submit that the opinion of the Seventh Circuit misapplies the decision of this Court in *Liepelt*. The opinion has interpreted the intent of this Court to achieve uniformity of application of federal law as a basis upon which the federal courts may now disregard state law and apply federal law as somehow "superior" or more "desirable". Further, and perhaps more importantly, the opinion of the Seventh Circuit will stand as a significant precedent by which the federal court system may now choose to ignore the principle of law announced in *Erie* and remove even the possibility of uniform application of state law. With the federal courts free to give state law their own interpretation, without any requirement that such interpretation be bound by state court practice, will permit the accident of diversity of citizenship to be the sole controlling factor in determining how state law is to be applied.

Petitioners respectfully submit that the opinion and judgment of the United States Court of Appeals for the Seventh Circuit is in error and creates a dangerous and undesirable precedent affecting the entire scope of the federal court system. For these reasons petitioners would respectfully request that this Honorable Court grant the writ of certiorari in this case.

Respectfully submitted,

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# APPENDIX A

## IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 81-3083, 81-3084

IN RE AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS ON MAY 25, 1979

Appeals of:

AMERICAN AIRLINES, INC. and
MCDONNELL DOUGLAS CORPORATION,

*Defendants-Appellants.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. MDL 391—**Edwin A. Robson** and **Hubert L. Will**, *Judges.*

ARGUED MAY 7, 1982—DECIDED FEBRUARY 15, 1983

Before COFFEY, *Circuit Judge*, SWYGERT, *Senior Circuit Judge*, and TEMPLAR, *Senior District Judge.**

SWYGERT, *Senior Circuit Judge.* This diversity case involves the wrongful death actions filed by the survivors of certain victims of the crash near Chicago on May 25, 1979, of a DC-10 aircraft manufactured by defendant McDonnell Douglas Corporation and owned by defendant American Airlines. Many of these actions, either filed in or removed to federal court, were consolidated for pretrial proceedings in the United States District Court for the Northern District of Illinois by an order of the Judicial Panel on Multidistrict Litigation. *In re Air*

* The Honorable George Templar, United States Senior District Judge for the District of Kansas, sitting by designation.

*Crash Disaster*, 476 F. Supp. 445, 449 (J.P.M.D.L. 1979). This interlocutory appeal from the district court's ruling on the parties' motions *in limine* raises two issues: first, whether a federal court sitting in diversity and applying the Illinois Wrongful Death Act,[1] *see In re Air Crash Disaster*, 644 F.2d 633, 637 (7th Cir. 1981), may admit evidence of the income tax liability the decedent would have incurred on the earnings lost because of premature death as an aid to accurate computation of the survivor's loss; and second, whether the court may instruct the jury that whatever award it makes will not be subject to federal income tax in the hands of the survivor.[2] The district court held that under the principles of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), it was bound to apply state law, and that Illinois courts would reject both the evidence and the jury instruction. *In re Air Crash Disaster*, 526 F. Supp. 226 (N.D. Ill. 1981). Because we hold that state and federal law do not differ on the evidence issue, we reverse that portion of the judgment. On the jury instruction issue, we reverse because *Erie* is inapplicable.

It is clear that in cases involving federal substantive law the evidence of "lost taxes" would be admissible and

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[1] Ill. Rev. Stat. ch. 70, ¶¶1-2.2 (1981). Section 2 of the Act provides in part:

> Every [wrongful death] action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the surviving spouse and next of kin of such deceased person.

[2] I.R.C. § 104(a)(2) excludes from gross income "the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." This section has been interpreted to include damage awards in wrongful death actions. *See* Rev. Rul. 54-19, 1954-1 C.B. 179; *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490, 496 & n.12 (1980).

the jury instruction on the nontaxability of the award would be proper, in appropriate circumstances. In *Norfolk & Western Railway v. Liepelt*, 444 U.S. 490 (1980), the Supreme Court held that in cases brought under the Federal Employers' Liability Act ("FELA") even state courts may not prohibit the admission of such evidence or the use of that instruction, reversing a decision of the Illinois Appellate Court, 62 Ill. App. 3d 653, 378 N.E.2d 1232 (1978), and overruling the Illinois Supreme Court's practice under FELA, *see Raines v. New York Central Railroad*, 51 Ill. 2d 428, 430, 283 N.E.2d 230, 232 (1972); *Hall v. Chicago & North Western Railway*, 5 Ill. 2d 135, 149-52, 125 N.E.2d 77, 85-86 (1955). Subsequent cases have adopted *Liepelt*'s reasoning in non-FELA federal contexts. *See, e.g., Fanetti v. Hellenic Lines Ltd.*, 678 F.2d 424, 431 (2d Cir. 1982) (Longshoremen's and Harbor Workers' Compensation Act); *Austin v. Loftsgaarden*, 675 F.2d 168, 183-84 (8th Cir. 1982) (Securities Act of 1933 and Securities Exchange Act of 1934). *See also Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 498 & n.17 (1981). The Supreme Court has left open the question whether it should extend *Liepelt* to diversity cases based on state law. *See id.* at 487-88 (reserving the question whether *Liepelt* would control when federal right of action incorporates state law).

The defendants urge that we reverse the district court on both the evidence and the jury instruction issues. On the former, they argue that the existence of the Federal Rules of Evidence, which apply even in diversity cases, *see* Fed. R. Evid. 101, 1101(b), and which declare relevant evidence admissible, *see* Fed. R. Evid. 402,[3] make *Erie* inapplicable; and that Fed. R. Evid. 401, as construed by *Liepelt*, provides the federal definition of

[3] Rule 402 provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

relevancy in this kind of case.[4] In addition, they argue that state law is identical to federal law on this issue in any case. On the jury instruction issue, they argue that *Hall* and *Raines*, the only Illinois Supreme Court precedents on point, are overruled by *Liepelt*, because they arose under FELA; and that we should predict that the Illinois Supreme Court would now find the reasoning of *Liepelt* persuasive. Alternatively, they argue that because the substance of the proposed instruction relates to the Internal Revenue Code, federal law should govern whether the instruction should be given, even in a diversity case. We address these issues in turn.

## I. Admissibility of Evidence

We agree that the Federal Rules of Evidence apply and that as a consequence the district court may not categorically exclude certain kinds of evidence relevant to the determination of damages. If the rules had been promulgated under the Supreme Court's rulemaking power, 28 U.S.C. § 2072 (1976), and did not transgress the limits of that power, this would be true under the reasoning of *Hanna v. Plumer*, 380 U.S. 460, 470-71 (1965). But the Rules of Evidence stand on even firmer footing, for they are statutory. Pub. L. No. 93-595, 88 Stat. 1959 (1975). In such a case the Rules of Decision Act, 28 U.S.C. § 1652 (1976), coupled with the supremacy clause of the United States Constitution, demands that the rules apply in federal court, unless Congress exceeded its powers to regulate federal courts in enacting them.

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[4] Rule 401 provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

*Liepelt* held that evidence of the income tax that would have been due on lost income is "demonstrably relevant," 444 U.S. at 495, in a wrongful death action under FELA, whose "measure of recovery is 'the damages . . . [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received,'" *id.* at 493, quoting *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59, 70 (1913).

The parties have not urged us to find, and we are not prepared to hold, that the rules are unconstitutional. *See* 10 J. Moore & H. Bendix, *Federal Practice* § 57 (2d ed. 1982).

Our conclusion is supported by many cases holding that the Federal Rules of Evidence govern the admissibility of evidence in diversity cases. *See, e.g., Rabon v. Automatic Fasteners, Inc.*, 672 F.2d 1231, 1238 n.14 (11th Cir. 1982); *Garwood v. International Paper Co.*, 666 F.2d 217, 223 (11th Cir. 1982); *Southern Stone Co. v. Single*, 665 F.2d 698, 701 (11th Cir. 1982); *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 1153 (5th Cir. 1981); *Croce v. Bromley Corp.*, 623 F.2d 1084, 1094 (5th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981); *Johnson v. William C. Ellis & Sons Iron Works, Inc.*, 609 F.2d 820, 821-22 (5th Cir. 1980); *Pollard v. Metropolitan Life Insurance Co.*, 598 F.2d 1284, 1286 (3d Cir.), *cert. denied*, 444 U.S. 917 (1979); *Gibbs v. State Farm Mutual Insurance Co.*, 544 F.2d 423, 428 n.2 (9th Cir. 1976). *See also Oberst v. International Harvester Co.*, 640 F.2d 863, 867 n.2 (7th Cir. 1980) (Swygert, J., concurring in part and dissenting in part). This result conforms with the practice in federal courts preceding the adoption of the Federal Rules of Evidence. *See* 10 J. Moore & H. Bendix, *Federal Practice* § 400.12[6]-(3) (2d ed. 1982) (in fashioning broad rules of admissibility, federal courts adopted state rules that favored admission but rejected state rules that favored exclusion); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2405 (1971 & Supp. 1982) (same).

It does not follow, however that state evidence rules have no bearing on what evidence is admissible in federal court, for the relevance of the evidence is ascertainable only by reference to the substantive law of the state. To the extent that the state evidentiary rule defines what is sought to be proved—here, the measure of damages—it may bind the federal court under *Erie* principles.

If Illinois followed the rule of the majority of state courts that evidence of would-be tax liability is inadmissible for the purpose of proving the amount of damages, *see* cases collected in Annot., 63 A.L.R.3d 1393 (1975 &

Supps.); *Louissaint v. Hudson Waterways Corp.*, 111 Misc. 2d 122, 125-26, 443 N.Y.S.2d 678, 680-81 (N.Y. Sup. Ct. 1981), this subsidiary *Erie* problem would be quite difficult. Courts have supplied several rationales for the exclusionary rule: they have argued that the calculation of net income is too speculative or confusing because of tax rate fluctuations and the difficulty of predicting exclusions and exemptions to which the decedent would have been entitled, *see, e.g., McWeeney v. New York, New Haven & Hartford Railroad*, 282 F.2d 34, 35-36 (2d Cir.) (*en banc*), *cert. denied*, 364 U.S. 870 (1960); that inaccuracies resulting from the projection of gross rather than net income are offset by the undercompensating effects of ignoring inflation and attorney's fees, *see, e.g., id.* at 38; and that by making the award tax exempt, *see supra* note 2, Congress intended to confer a tax benefit that should be reflected in the calculation of the award, *see, e.g., Louissaint v. Hudson Waterways Corp.*, 111 Misc. 2d at 128-29, 443 N.Y.S.2d at 682.

The last of these rationales should carry no weight any longer in any court, to the extent that it relies on an interpretation of federal tax law rejected by *Liepelt*. 444 U.S. at 495 n.10. Nevertheless, the remaining considerations may be so closely linked with the state's view of the measure of damages (which is inseparable from the substantive right of action, *see Chesapeake & Ohio Railway v. Kelly*, 241 U.S. 485, 491 (1916)) that it binds a federal court sitting in diversity. Several courts have either held or assumed that state law governs admissibility in this situation. *See Vasina v. Grumman Corp.*, 644 F.2d 112, 118 (2d Cir. 1981); *Fenasci v. Travelers Insurance Co.*, 642 F.2d 986, 989 (5th Cir.), *cert. denied*, 454 U.S. 1123 (1981); *Estate of Spinosa v. International Harvester Co.*, 621 F.2d 1154, 1158-59 (1st Cir. 1980); *Huddell v. Levin*, 537 F.2d 726, 742 (3d Cir. 1976); *Turcotte v. Ford Motor Co.*, 494 F.2d 173, 185 (1st Cir. 1974). *But see Croce v. Bromley Corp.*, 623 F.2d 1084, 1094 (5th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981) (holding that Fed. R. Evid. 403 controls). In addition, many courts have found similar state admissibility rules applicable in diversity cases. *See Budge v. Post*, 543 F.2d 372, 375 (5th Cir. 1981)

(reduction of award to present value); *Murphy v. Georgia-Pacific Corp.*, 628 F.2d 862, 869 (5th Cir. 1980) (evidence and jury instruction on inflation); *Bailey v. Southern Pacific Transportation Co.*, 613 F.2d 1385, 1388 (5th Cir.), *cert. denied*, 449 U.S. 836 (1980) (evidence of remarriage in mitigation of damages); *Conway v. Chemical Leaman Tank Lines, Inc.*, 540 F.2d 837, 838-39 (5th Cir. 1976) (same); *Johnson v. Serra*, 521 F.2d 1289, 1294 (8th Cir. 1975) (inflation); *Weakley v. Fischbach & Moore, Inc.*, 515 F.2d 1260, 1267 (5th Cir. 1975) (inflation); *Mahoney v. Roper-Wright Manufacturing Co.*, 490 F.2d 229, 232 (7th Cir. 1973) (evidence of alternative design feasibility in products liability case); *Chicago, Rock Island & Peoria Railway v. Howell*, 401 F.2d 752, 754 (10th Cir. 1968) (competency of circumstantial evidence); *E.L. Cheeney Co. v. Gates*, 346 F.2d 197, 206 (5th Cir. 1965) (admissibility of driving convictions to show incompetence).

Perhaps the most appealing argument that admissibility rules are tied to the substantive law is the analogy to *Liepelt* itself, which required state courts to apply a federal admissibility rule when adjudicating a federal claim. 444 U.S. at 493. This argument assumes, however, that *Erie* considerations work in reverse, and that assumption may be unwarranted. *Liepelt* expressly relied on the overwhelming federal interest in uniformity of practice under FELA, and the supremacy clause gives the federal government power to impose even a procedural rule on state courts in these circumstances. *See id.* at 493 n.5, citing *Brady v. Southern Railway*, 320 U.S. 476, 479 (1943) ("Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring [FELA's] authority in state courts. Only by a uniform federal rule . . . may litigants under the federal act receive similar treatment in all states."). *See also* Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?*, 17 Ohio St. L.J. 384, 390, 414-15 (1956) (cited with approval in *Liepelt*, 444 U.S. at 493 n.5); *Liepelt*, 444 U.S. at 503-04 (Blackmun, J., dissenting) (noting that federal regulation of state procedure is warranted when a federal interest is implicated). If

*Liepelt* required the admissibility of tax evidence because of the need for uniform procedure rather than as a substantive FELA requirement, it sheds little light on whether state admissibility rules should be characterized as "procedural" or "substantive" for *Erie* purposes.

Moreover, despite the weight of authority and analogy there are good reasons to characterize the majority admissibility rule as procedural and therefore not binding on the federal courts under *Erie*. In adopting the rule that rejects evidence as being too confusing, a state court may merely be making a statement about its own competence and that of its juries to deal with this kind of evidence. But a federal court may assess its own capabilities differently, and logically should not be bound by the state court's self-evaluation. *Cf. Monarch Insurance Co. v. Spach*, 281 F.2d 401, 407 (5th Cir. 1960). Indeed, to the extent that the exclusionary rule is based on fear of confusion, it should not apply in federal court because Fed. R. Evid. 403 provides a federal standard for rejecting relevant evidence on the grounds of risk of prejudice, confusion, or waste of time,[5] and, as shown above, the Federal Rules generally displace differing state rules even when the state rule is "outcome-determinative." *Hanna v. Plumer*, 380 U.S. 460, 470-74 (1965). *Liepelt* demonstrates that rule 403 would not categorically bar evidence of taxability. 444 U.S. at 494 & n.7.

Fortunately, we need not resolve this *Erie* conundrum in this case, because we hold that Illinois' substantive measure of damages is identical to the FELA measure, leaving the district court free to admit all evidence relevant to that measure under Fed. R. Evid. 402.

It is true that federal district court determinations of uncertain state law are ordinarily entitled to great weight. *See Buehler Corp. v. Home Insurance Co.*, 495

[5] Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

F.2d 1211, 1214 (7th Cir. 1974). They nevertheless remain reviewable as questions of law, *see id.*, and in the circumstances of this case less than the usual deference may be due because the district court confessed its own uncertainty when it certified this interlocutory appeal under 28 U.S.C. § 1292(b) (1976). *See In re Air Crash Disaster*, 526 F. Supp. 226, 233-34 (N.D. Ill. 1981).

The Illinois Supreme Court has never decided whether evidence of the hypothetical tax liability of lost earnings is admissible in wrongful death cases. In *Hall v. Chicago & North Western Railway*, 5 Ill. 2d 135, 149-50, 125 N.E.2d 77, 85 (1955), a personal injury case under FELA, it noted that the trial court's exclusion of such evidence was in accordance with the majority rule. We are not persuaded by the defendants' argument that this case has no further force because it was overruled by *Liepelt* as to FELA actions; for the reasoning by which the Illinois court reached its conclusion in *Hall* may still represent the view the court would favor on questions of Illinois law. But we find the statement in *Hall* less than compelling for three other reasons.

First, *Hall* was a personal injury case in which the propriety of a statement to the jury on the nontaxability of the award was in issue, and the court's apparent approval of the majority rule on the exclusion of evidence was colored by that posture. The court interpreted federal law to grant a tax benefit to the recipient of the award by making it nontaxable, and feared that this benefit would be negated if the amount of the award were calculated on the basis of lost after-tax income, or if the jury were told that the award was tax free. *See* 5 Ill. 2d at 152, 125 N.E.2d at 86 ("[I]f the jury were to mitigate the damages of the plaintiff by reason of the income tax exemption accorded him, then the very Congressional intent of the income tax law to give the injured party a tax benefit would be nullified."). The conclusion that the award should be calculated on the basis of gross income was particularly inviting in the personal-injury context, because the injured person whose lost earnings were being calculated was the recipient of the award

made nontaxable under federal law. The award thus directly represented the lost earnings, making the assumption that both should be tax free easy. This is not true in the wrongful-death context; there, the recipient is the survivor, who is entitled, as we discuss below, to the amount the decedent would have contributed to the survivor's support—that is, the lost income net of taxes, personal consumption, and the like. This difference has caused some courts and commentators to draw a distinction between the use of tax evidence in personal-injury and wrongful-death cases. *See, e.g., Louissaint v. Hudson Waterways Corp.*, 111 Misc. 2d at 126-27, 443 N.Y.S.2d at 680-81; Wright, *Damages for Personal Injuries: Foreword*, 19 Ohio St. L.J. 155, 157 (1958).

Moreover, the Illinois court's interpretation of federal law was wrong in any case. *Liepelt* interpreted the Internal Revenue Code not to confer an absolute benefit that changes the measure of damages due. 444 U.S. at 496 n.10. *Liepelt* means, in effect, that the tax law simply makes the recipient no worse off (in terms of taxes, at any rate) than he would have been had the injury not occurred, by excusing the payment of tax on awards from which potential taxes have already been deducted. To the extent that *Hall*'s approval of the exclusionary rule was premised on its mistaken interpretation of federal law, it has no force.

Finally, *Hall*'s approval of the majority rule was dictum, because the only issue before the court was whether the jury could be told that the award was nontaxable. Considered dicta of a state supreme court must be given weight by a federal court in ascertaining state law, *see Gee v. Tenneco, Inc.*, 615 F.2d 857, 861 (9th Cir. 1980), but casual dicta are not entitled to the same degree of deference. *See McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 662 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980); 1A J. Moore, W. Taggart, A. Vestal & J. Wicker, *Federal Practice* ¶ 0.307[2], at 3094-98 (2d ed. 1982). In *Hall* the Illinois Supreme Court seems to have approved the use of evidence of gross income because of the weight of authority from other jurisdictions (aside from its mis-

taken view of federal law), rather than for any strong policy reasons of its own. 5 Ill. 2d at 149-50, 125 N.E.2d at 85. This approval has little precedential weight both because of its lack of articulated reasons and because the unanimity of authority on which it relied has eroded.

Even before *Liepelt*, at least seven jurisdictions permitted some consideration of tax consequences. *See Mosley v. United States*, 538 F.2d 555, 558-59 (4th Cir. 1976) (applying North Carolina law); *Turcotte v. Ford Motor Co.*, 494 F.2d 173, 184-86 (1st Cir. 1974) (applying Rhode Island law); *Runyon v. District of Columbia*, 463 F.2d 1319, 1322 (D.C. Cir. 1972) (applying District of Columbia law); *Floyd v. Fruit Industries, Inc.*, 144 Conn. 659, 671-73, 136 A.2d 918, 925-26 (1957); *Adams v. Deur*, 173 N.W.2d 100, 105-06 (Iowa 1969); *Dempsey v. Thompson*, 363 Mo. 339, 344-46, 251 S.W.2d 42, 45-46 (1952) (jury instruction issue only); *Tenore v. Nu Car Carriers, Inc.*, 67 N.J. 466, 484-95, 341 A.2d 613, 623-29 (1975). *See also Abele v. Massi*, 273 A.2d 260, 260-61 (Del. 1970) (recognizing net income as the true measure, but finding use of evidence of taxability impractical). Since *Liepelt*, two state supreme courts and one lower state court have expressly adopted its reasoning. *See Dennis v. Branchfield*, 292 Md. 319, ....., 438 A.2d 1330, 1332-34 (1982) (jury instruction issue only); *Curtis v. Finneran*, 83 N.J. 563, 569, 417 A.2d 15, 18 (1980); *In re Eader*, 70 Ohio Misc. 17, ....., 434 N.E.2d 757, 759-60 (Ohio Ct. Cl. 1982). Four state supreme courts and five lower state courts have expressly rejected *Liepelt*. *See Irwin v. Pacific Southwest Airlines*, 133 Cal. App. 3d 709, 717-18, 184 Cal. Rptr. 228, 231-33 (1982) (jury instruction issue only); *Griffin v. General Motors Corp.*, ..... Mass. ....., ....., 403 N.E.2d 402, 406-08 (1980); *Tennis v. General Motors Corp.*, 625 S.W.2d 218, 226-28 (Mo. Ct. App. 1981) (relying on exclusivity of state pattern jury instructions); *Louissaint v. Hudson Waterways Corp.*, 111 Misc. 2d at 126-27, 443 N.Y.S.2d at 681 (personal injury cases only); *South v. National Railroad Passenger Corp.*, 290 N.W.2d 819, 827-28 (N.D. 1980); (jury instruction issue only); *Dehn v. Prouty*, 321 N.W.2d 534, 538-39 (S.D. 1982) (jury instruction issue only); *Gulf Offshore Co. v. Mobil Oil*

*Corp.*, 628 S.W.2d 171, 172-73 (Tex. Civ. App. 1982) (jury instruction issue only); *Barnette v. Doyle*, 622 P.2d 1349, 1365-67 (Wyo. 1981) (jury instruction issue only). Because the authorities are now split, we cannot assume that the Illinois Supreme Court would be content to follow its dictum based on the then-unanimous state rule. Instead, we must consult all of the available data that the Illinois court would consider in reaching a decision on the issue. *See West v. A.T.&T.*, 311 U.S. 223, 237 (1940); *Huff v. White Motor Corp.*, 565 F.2d 104, 106 (7th Cir. 1977).

One possible source of state law is the opinion of an intermediate state court. *See West v. A.T.&T.*, 311 U.S. at 237. One pre-*Liepelt* Illinois appellate cases has said that *Hall* does not control whether evidence of net income is admissible in an action under the Wrongful Death Act, but held that the admissibility issue had not been preserved for appeal. *Peluso v. Singer General Precision, Inc.*, 47 Ill. App. 3d 842, 853-54, 365 N.E.2d 390, 399 (1977). A concurring opinion in the same case found that the issue had been preserved, that no Illinois precedent existed, and that Illinois would follow the rule later adopted in *Liepelt*, citing much of the same evidence on which the Supreme Court was to rely. *Id.* at 856-59, 365 N.E.2d at 401-03. Although this evidence of the Illinois Supreme Court's view would not be compelling if other data tended the other way, it confirms our view of *Hall*'s lack of precedential force and indicates how an Illinois court might fill that void.

The manner in which Illinois courts have expressed the measure of damages in wrongful death cases supports the view that lost income should be reduced by the amount it would have been taxed. The Illinois Wrongful Death Act, Ill. Rev. Stat. ch. 70, ¶2 (1981), provides that "fair and just compensation with reference to the pecuniary injuries resulting from [the] death" is the amount due to the survivor. The Illinois Supreme Court has interpreted this statute to permit recovery only of the amount the survivor would have received from the decedent but for the death. In *Elliott v. Willis*, 92 Ill. 2d 530, 540-51, ..... N.E.2d ....., ..... (1982), it held:

> The purpose of the Wrongful Death Act is to compensate the surviving spouse and next of kin for the pecuniary losses sustained due to the decedent's death. . . . It is intended to provide the surviving spouse the benefits that would have been received from the continued life of the decedent. . . .
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> . . . The test is a measurement of benefits of pecuniary value that the decedent might have been expected to contribute to the surviving spouse and children had the deceased lived.

*See also Graul v. Adrian*, 32 Ill. 2d 345, 346, 205 N.E.2d 444, 445 (1965); *Welch v. Davis*, 410 Ill. 130, 133, 101 N.E.2d 547, 549 (1951); *Robertson v. White*, 11 Ill. App. 2d 177, 181, 136 N.E.2d 550, 553 (1956); *McClure v. Lence*, 345 Ill. App. 158, 164, 102 N.E.2d 546, 550 (1952); *Paul v. Garman*, 310 Ill. App. 447, 463-64, 34 N.E.2d 884, 891 (1941). As *Liepelt*, 444 U.S. at 493, and *Peluso*, 47 Ill. App. 3d at 857, 365 N.E.2d at 402 (Sullivan, J., concurring), have pointed out, the amount that the survivor would have expected to receive could not include the amount that would have been paid in taxes. *See also Cox v. Northwest Airlines, Inc.*, 379 F.2d 893, 896 (7th Cir. 1967).

We do not hesitate to conclude that Illinois courts would admit tax evidence to reach this abstract measure, because they are not unfamiliar with similar economic adjustments of damage awards. It is permissible in Illinois to introduce mortality tables, *Avance v. Thompson*, 387 Ill. 77, 83-84, 55 N.E.2d 57, 60, *cert. denied*, 323 U.S. 753 (1944) (action under FELA, but prior to the distinction between state and federal rules for FELA cases); *American National Bank & Trust Co. v. Bourland*, 65 Ill. App. 3d 977, 980, 382 N.E.2d 1380, 1382 (1978), and to introduce evidence to enable the jury to reduce awards for future losses to present value, *see Allendorf v. Elgin, Joliet & Eastern Railway*, 8 Ill. 2d 164, 178, 133 N.E.2d 288, 296 (FELA action), *cert. denied*, 352 U.S. 833 (1956);

*see also* Illinois Supreme Court Committee on Jury Instructions, *Illinois Pattern Jury Instructions: Civil* § 34.03 (1971); to deduct from the lost gross earnings the decedent's lost personal expenditures, *see Scully v. Otis Elevator Co.*, 2 Ill. App. 3d 185, 200, 275 N.E.2d 905, 915 (1971) (Structural Work Act case), and perhaps to correct the portion of the award allocable to future losses for the effects of inflation, *see Raines v. New York Central Railroad*, 51 Ill. 2d at 435-37, 283 N.E.2d at 234-35; *O'Brien v. Chicago & North Western Railway*, 329 Ill. App. 382, 402, 68 N.E.2d 638, 648 (1946). Moreover, there are some indications that income tax adjustments are made in practice in Illinois courts. *See Baird v. Chicago, Burlington & Quincy Railroad*, 63 Ill. 2d 463, 468, 349 N.E.2d 413, 415 (1976); *Allendorf v. Elgin, Joliet & Eastern Railway*, 8 Ill. 2d at 181, 133 N.E.2d at 296. Because this is the kind of evidence that Illinois courts would, or in fact do, entertain in measuring damages, we may predict that this is the course the Illinois Supreme Court would endorse were the issue presented to it. Indeed, because Illinois so scrupulously adjusts its damage awards to make them compensatory, *see* Illinois Supreme Court Committee on Jury Instructions, *Illinois Pattern Jury Instructions: Civil* § 31.04 (1971),[6] failure to adjust

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[6] The pattern jury instructions recommend that in a case of wrongful death of an adult leaving lineal survivors the jury be instructed that:

> [i]n determining pecuniary loss . . . you may consider what benefits of pecuniary value, including money, goods, and services the decedent might reasonably have been expected to contribute to the [survivor] had the decedent lived, bearing in mind the following factors concerning the decedent:
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> 1. What he customarily contributed in the past;
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> 2. What he earned or what he was likely to have earned in the future;
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> 3. What he spent for customary personal expenses [and other deductions];
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> 4. What instruction, moral training, and superintendence of education he might reasonably have been expected to give his [child] [children] had he lived;

(Footnote continued on following page)

the award for taxes might render is partially punitive, and it is the law of Illinois as well as the law of this case that punitive damages are unavailable in wrongful death cases. *See In re Air Crash Disaster*, 644 F.2d 594, 605 (7th Cir. 1981).

Our conclusion is not altered by the fact that in *Elliott v. Willis*, 92 Ill. 2d at 341, ..... N.E.2d at ....., the Illinois Supreme Court refused to permit adjustment of a wrongful death award to reflect the lost investment earnings of estate funds used to pay premature estate taxes, even though that money would have been available to benefit the survivors but for the wrongful death. Although the court's reasoning is not clear, the juxtaposition of its formulation of the abstract measure of damages, quoted above, and its decision not to allow the adjustment suggests that it considered the adjustment too inconsequential to bother with, perhaps because of the uncertainty of the calculations on which the adjustment would depend. Even *Liepelt* recognized that some adjustments could be refused if their bases became too attenuated. *See* 444 U.S. at 494 n.7. The standard for such a refusal is supplied by Fed. R. Evid. 403, *see id.*, which, as we have shown above, would displace any similar state rule in federal court. We conclude that *Elliott*'s holding should not bind the district court in this case.

II. Jury Instruction on Nontaxability of Award

It is clear that under current Illinois practice it is proper to refuse to instruct a jury that a damage award in a wrongful death case (by whatever means it is computed) will not be subject to taxation. In *Hall v. Chicago & North Western Railway*, 5 Ill. 2d at 148-53, 125 N.E.2d

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[6] *continued*

5. His age;
6. His health;
7. His habits of industry, sobriety, and thrift;
8. His occupation.

at 84-86, the Illinois Supreme Court held that a new trial was proper in a personal-injury case under FELA because of the defense counsel's remarks in closing argument that any award would be nontaxable. It reasoned that, even if the argument correctly stated the law, it was improper because the jury was instructed on the proper measure of damages and should be presumed to follow instructions; because the possible profusion of similar cautionary instructions would be undesirable; and because, if an instruction on nontaxability were given, the jury might deprive the recipient of a tax benefit intended by Congress, by decreasing the award. *Id.* at 150-52, 125 N.E.2d at 86. In a subsequent FELA personal-injury case the Illinois Supreme Court reaffirmed its approach in *Hall*, quoting the third rationale. *Raines v. New York Central Railroad*, 51 Ill. 2d at 430, 283 N.E.2d at 232. Although *Hall* and *Raines* were FELA cases, it is likely that their reasoning would survive their specific reversal by *Liepelt*, because the court decided them on the basis of general Illinois jurisprudence rather than on principles peculiar to FELA cases. Several post-*Liepelt* Illinois appellate decisions confirm the vitality of *Hall* and *Raines* in actions based on state law. *Edwards v. Kelsey-Hayes Co.*, No. 81-2343, slip op. at 8 (Ill. App. Aug. 31, 1982); *Johnson v. Hoover Water Well Service, Inc.*, 108 Ill. App. 3d 994, 1009, 439 N.E.2d 1284, 1294-95 (1982); *Christou v. Arlington Park-Washington Park Race Tracks Corp.*, 104 Ill. App. 3d 257, 262, 432 N.E.2d 920, 925 (1982); *Newlin v. Foresman*, 103 Ill. App. 3d 1038, 1046-47, 432 N.E.2d 319, 325-26 (1982) (wrongful death action). These cases are powerful evidence of the content of Illinois law. *See West v. A.T.&T.*, 311 U.S. at 237.

Ordinarily in diversity cases state law determines the content of jury instructions and federal law governs only the manner in which instructions are requested and given. *See* 5A J. Moore & J. Lucas, *Federal Practice* ¶ 51.02-1 (2d ed. 1982); Fed. R. Civ. P. 51. This rule is rooted in *Erie* principles insofar as the jury instruction expounds substantive state law. That rationale may be lacking in the present case, however, because

Illinois law refuses the instruction altogether rather than defining its content, and in any case the substantive law to which the instruction, if given, relates is the Internal Revenue Code. Unless Illinois has a substantive interest in refusing the instruction, therefore, perhaps federal law should control.

At first glance, Illinois does appear to have such a substantive interest. In *Hall* the Illinois Supreme Court did not merely endorse the refusal to inform the jury of the nontaxability of an award; it ordered a new trial because it considered the possibility that the jury acted on the information, even if the information was truthful, a positive evil. 5 Ill. 2d at 151-53, 125 N.E.2d at 86. It therefore seems that the court regarded the possibility of a windfall, beyond the stated measure of damages, as part of the substantive right.

On closer inspection, however, it appears that the basis for the possible windfall was federal tax law, as interpreted by the Illinois court: *Hall* feared that the instruction might undo a tax benefit intended by Congress, by impelling the jury to reduce the award by the amount of the tax exemption. 5 Ill. 2d at 152, 125 N.E.2d at 86, quoted in *Raines*, 51 Ill. 2d at 430, 283 N.E.2d at 232. But this reasoning, as we have already noted twice, is based on a misapprehension of federal law. *Liepelt* interprets federal law to create no positive tax benefit. 444 U.S. at 496 n.10. Because plaintiffs are not entitled under state or federal law to receive a bonus beyond compensatory damages, so informing the jury is harmless at most.[7]

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[7] Our conclusion would be different if Illinois interpreted its own substantive law to include a right to such a possible bonus. It is only because the result in *Hall* seems to depend on its view of the requirements of federal law (a characterization reinforced by the Illinois Supreme Court's abstract formulation of the measure of damages in wrongful death cases) that we find it not controlling. *Cf. Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (when state ground for decision is dependent on federal law, a federal question is presented); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) (same).

*Hall*'s other two rationales for refusing to instruct the jury on this issue—that it is unnecessary if the measure of damages is made clear, and that it would invite a flood of cautionary instructions—should not bind a federal court because they speak to matters of court administration, about which the federal courts have independent competence. Some state procedures, of course, are so "outcome-determinative" as to be inseparable from the substantive law, and must be applied in diversity cases by federal courts. *See Byrd v. Blue Ridge Electric Cooperative, Inc.*, 356 U.S. 525, 535-36 (1958). We would be faced with an ironic quandary if we were compelled to apply the outcome-determinativeness test in this case: if we adopt the state's assumption that juries will follow instructions on the measure of damages, *Hall*, 5 Ill. 2d at 150-51, 125 N.E.2d at 85-86, giving the tax instruction will be superfluous and not outcome-determinative; but if we adopt *Liepelt*'s assumption that juries are likely to inflate awards absent the tax instruction, 444 U.S. at 497, not giving the instruction will affect the outcome. State rules thus point to application of federal law, and federal rules to state law. But the outcome-determinativeness test is inappropriate here, because we have already determined that increasing awards beyond compensation would be an improper outcome under state law. The district court therefore is free to give the tax instruction despite contrary state procedure.[8]

We conclude that Illinois's substantive measure of damages is the same as the measure under FELA examined in *Liepelt*, and that the district court may admit all evidence relevant to that measure, subject to the con-

[8] This case's posture distinguishes it from *Croce v. Bromley Corp.*, 623 F.2d at 1097, in which the Fifth Circuit refused to order a new trial for failure to give a tax instruction, because there was no indication that the verdict had been inflated. Here, we review the rules for a future trial, not a completed one.

siderations of Fed. R. Evid. 403.[9] We also conclude that, although Illinois courts very likely would not instruct the jury that any damages it awarded would be nontaxable, the Illinois practice does not bind the federal courts under *Erie* because, so far as we can determine from the cases, Illinois's concerns are either procedural or based on a mistaken view of federal law. For these reasons the judgment of the district court is reversed. The parties shall bear their own costs.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

[9] Such tax evidence need not be limited to the amount of tax the decedent would have paid on lost income. Because damage awards are reduced to present value with the expectation that by investment they will replace a lost future income stream, and because the interest so earned is taxable as income, *see In re Air Crash Disaster*, 526 F. Supp. at 227 n.1, it may be necessary to consider evidence on the amount by which the damage award should be increased to account for this tax. *See Liepelt*, 444 U.S. at 495.

# APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 31, 1983

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*
Hon. GEORGE TEMPLAR, *Senior District Judge**

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IN RE: AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS ON MAY 25, 1979

Nos. 81-3083, 81-3084

APPEALS OF: AMERICAN AIRLINES, INC. AND McDONNELL DOUGLAS CORPORATION,

*Defendants-Appellants.*

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Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. MDL 391—**Edwin A. Robson** and **Hubert L. Will**, *Judges.*

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## ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc of the above entitled matter, the members of the original panel have voted to deny said petition for rehearing, and no active member of the court having requested a vote on the suggestion for a rehearing en banc,

IT IS ORDERED that said petition for rehearing be, and the same is hereby denied.

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* The Honorable George Templar, United States Senior District Judge for the District of Kansas, is sitting by designation.

# APPENDIX C

In re AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS ON MAY 25, 1979

This Document Relates to,

Syed HAIDER, as Administrator of the Estate of Victoria Chen Haider, Deceased, Plaintiff,

v.

McDONNELL DOUGLAS CORPORATION, a corporation; and American Airlines, Inc., a corporation, Defendants.

MDL 391.
No. 79 C 2444.

United States District Court,
N. D. Illinois, E. D.

Nov. 17, 1981.

John J. Kennelly, Chicago, Ill., for plaintiff Syed Haider.

Norman J. Barry and Christopher G. Walsh, Jr., Rothschild, Barry & Myers, Chicago, Ill., for defendant McDonnell Douglas Corp.

Thomas D. Allen, Robert E. Haley, Elise E. Singer, Wildman, Harrold, Allen & Dixon, Chicago, Ill., for defendant American Airlines, Inc.

William P. Butler and C. Kevin McCabe, Lord, Bissell & Brooke, Chicago, Ill., for Motor Vehicle Mfrs. Ass'n of the United States, Inc. (amicus curiae).

ROBSON and WILL, District Judges.

## MEMORANDUM AND ORDER

Victoria Chen Haider, a resident of Illinois, was one of 273 people who died in the crash of an airplane, built by McDonnell Douglas Corporation (MDC), and owned and operated by American Airlines (American), outside Chicago on May 25, 1979. The wrongful death action brought by her husband (who is still a resident of Illinois), as the administrator of her estate, was consolidated with approximately 150 others for pretrial proceedings in this Court. Federal jurisdiction is based upon diversity of citizenship under 28 U.S.C. § 1332.

Defendants seek to introduce evidence as to the portion of the decedent's past earnings which were subject to taxation, and evidence as to the percentage of any future earnings which would have been paid as taxes had the decedent lived. Defendants also seek to have the jury instructed that:

> If you decide to award any damages to the plaintiff, your award will be exempt from any income taxes; therefore, in fixing the amount of your award, you should not be concerned about or consider the effect of taxes on the award.[1]

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[1] The Internal Revenue Code's treatment of damages for wrongful death is more complex than MDC's requested instruction states it to be. Only the principle of a damages award is free from federal income taxation. Interest earned on the invested principle—a component of "just compensation," given the fact that juries are instructed to reduce awards to present value to account for reasonable investment opportunities—is, however, subject to federal income taxation. 26 U.S.C. § 104(a)(2); Rev.Rul. 54-19, 1954-1 C.B. 179; Rev.Rul. 65-29, 1965-1 C.B. 59. Moreover, in some of these cases, the plaintiff-survivor will have to pay federal taxes on this investment income as a single taxpayer, whereas, had the decedent not died, federal taxes on these earnings would have been paid on a joint-return basis. Because of the different tax rates imposed on the earnings of single and married taxpayers, the investment income from a damages award will be subject to higher taxes than would the same earnings had they accrued to the decedent over the course of a normal life-expectancy. Ward and Olson, *The Economic Impact of Income Tax on Damage Awards*, 17 Trial 47, 48 (No. 8, August, 1981).

Plaintiff Syed Haider opposes both the introduction of this evidence and the giving of instructions as to the tax status of damages awards. Both plaintiff and defendant MDC have filed motions *in limine* seeking a determination of these issues. For the reasons hereinafter stated, we grant plaintiff's motion and deny defendant's motion.[2]

We note preliminarily that the questions whether evidence of the effect of taxation upon earnings is admissible, and whether the jury should be instructed as to the tax status of any award, are separate issues. Nordstrom, *Income Taxes and Personal Injury Awards*, 19 Ohio St. L.J. 212, 219-21 (1958). But in the context of an action whose federal jurisdiction rests upon diversity of citizenship, our inquiry is limited to two issues: (1) whether the determination of the issues raised in the parties' motions is to be made pursuant to Illinois law or federal law, and (2) whether Illinois law, if it applies, would lead to a different result than would federal law. Because there would be no need to determine whether Illinois or federal law governs the resolution of the issues raised in these motions if application of either Illinois law or federal law led to the same result, we address first the question whether Illinois law and federal law would resolve these issues differently.

I.

Federal law, if applicable to an action whose jurisdiction rests on diversity of citizenship, would require

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[2] Plaintiff raised and briefed his motion as one which pertains to *Haider*. American designated its answer to plaintiff's motion and supporting memorandum as pertaining to *Haider* and to two other cases. Finally, MDC designated its cross-motion and memoranda as pertaining to *Haider*, the two cases identified by American, and several other of the cases which have been transferred to this Court for pretrial proceedings. Our focus in this opinion is upon *Haider*, but we regard the effect of this opinion as extending at least to all other cases in which the plaintiff and the decedent are and were domiciliaries of Illinois.

that we admit evidence of the effect of taxation upon the decedent's estimated capacity to contribute to the support of her family. The admissibility of this evidence is governed by the concepts of materiality and relevance. *See* Rules 401-03, Federal Rules of Evidence (FRE). Because "just compensation" under the Illinois Wrongful Death Act[3]—the source of plaintiff's substantive rights in this action—is restricted to the "pecuniary loss" sustained by the decedent's survivors, *Kaiserman v. Bright*, 61 Ill.App.3d 67, 18 Ill.Dec. 108, 377 N.E.2d 261, 263 (1978), evidence of the effect of taxation upon earnings is "of consequence to the determination" of "just compensation." Rule 401, FRE. Defendants correctly state that, because the focus of the Illinois Wrongful Death Act is on the decedent's contributions to her survivors rather than on her earnings, the amount which would have been taken in taxation is relevant to the determination of the portion of her earnings which would have been or could have been contributed to her survivors.

The conclusion that federal law would probably admit evidence of the effect of taxation upon a decedent's earnings, subject to the limitations of Rule 403, receives some support from the Supreme Court's recent decision in *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980). In *Liepelt*, the Court held that an Illinois state court erred in refusing evidence as to taxation of the decedent's earnings in a wrongful death action brought under the Federal Em-

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[3] Ill.Rev.Stat. ch. 70, § 2 (1979) states, in pertinent part:

> Every such action shall be brought by and in the names of the personal representatives of such deceased person, and . . . the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the surviving spouse and next of kin of such deceased person.

ployers Liability Act (FELA).[4] The Court noted that the FELA, in addition to seeking to "'create uniformity throughout the Union' with respect to railroads' financial responsibility for injuries to their employees," is compensation oriented. 444 U.S. at 493 and n.5, 100 S.Ct. at 757, *quoting from* H.R.Rep.No. 1386, 60th Cong., 1st Sess. 3 (1908). It reasoned that "after-tax income . . . provides the only realistic measure of [a person's] ability to support [others]," and that a wage earner's income tax is therefore relevant to a determination of the monetary loss suffered by her family when she dies. 444 U.S. at 493-94, 100 S.Ct. at 757-58.

Similarly, it appears that federal law, if applicable, would require that we instruct the jury that under section 104(a)(2) of the Internal Revenue Code, the principle of an award for damages is not taxable. Both defendants argue essentially that *Liepelt*, if applicable to a diversity action, requires giving the requested instruction. American points to the compensatory nature of both the FELA and the Illinois Wrongful Death statute. MDC argues that the instruction is merely cautionary. MDC notes that the giving of cautionary instructions is generally within the discretion of the trial court, *Simineo v. School District No. 16*, 594 F.2d 1353, 1357 (10th Cir. 1979); *Krieger v. Bausch*, 377 F.2d 398, 402 (10th Cir. 1967), but claims that *Liepelt* demonstrates that in certain circumstances cautionary instructions are mandated when requested by a party. Our reading of *Liepelt*, however, convinces us that the Court did not intend its holding in that case to be read so broadly. *Liepelt* dealt with the narrow realm of actions brought under the FELA, and did not purport to address the issues of the admissibility of evidence and the propriety of instructions, concerning taxation, outside the context of the FELA. *Estate of Spinosa*, 621 F.2d 1154 (1st Cir. 1980); *Croce v. Bromley Corp.*, 623 F.2d

[4] 45 U.S.C. §§ 51 *et seq.* (1976).

1084 (5th Cir. 1980); *Fenasci v. Travelers Ins. Co.*, 642 F.2d 986 (5th Cir. 1981); see also *Vasina v. Grumman Corp.*, 644 F.2d 112 (2d Cir. 1981). Some clarification of *Liepelt* is provided in *Gulf Offshore Co. v. Mobil Oil Corp.*, ..... U.S. ....., 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981), an action for personal injuries brought under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331 *et seq.*, which raised the question whether Louisiana law permits or percludes instructing the jury concerning the taxability of an award but did not present the question whether evidence showing the effect of income taxes on past and future earnings is admissible. The Court noted that the OCSLA, unlike the FELA, explicitly authorizes the adoption of state law to the extent that it is not inconsistent with federal law. The Court noted that *Liepelt* was based on the need for uniformity in FELA actions. The Court stated that *Liepelt*, because the FELA afforded no guidance as to whether juries must be instructed on the status of compensatory damages, had announced a "federal common law rule." 101 S.Ct. at 2879-80. The Court added that Congress, in providing that the OCSLA incorporates applicable state law, "'specifically rejected national uniformity' as a paramount goal" in the OCSLA. *Id.* at 2880, *quoting Chevron Oil v. Huson*, 404 U.S. 97, 104, 92 S.Ct. 349, 354, 30 L.Ed.2d 296 (1972). The Court remanded *Gulf Offshore* to the Texas Court of Civil Appeals for a determination of whether Louisiana law requires giving an instruction as to the taxability of a damages award, and, if it does not, whether *Liepelt* displaces the state rule in OCSLA cases.

*Gulf Offshore* indicates that the "federal common law rule" of *Liepelt* is limited to situations similar to those in which it arose. We assume, however, for the sake of argument, that federal law requires giving the instruction in addition to admitting evidence as to taxation, and we proceed to a determination of whether Illinois law provides otherwise.

Neither the Illinois Wrongful Death Act nor the Illinois Pattern Instructions concerning the calculation of damages in wrongful death cases, IPI (Civil) § 31.01-.03, contains any reference to the use of evidence as to a decedent's after-tax income to establish the pecuniary loss to the decedent's survivors or to the tax treatment accorded damages by the Internal Revenue Code. Before *Liepelt*, Illinois prohibited, in FELA actions brought in state court, both the introduction of evidence on the effect of taxes upon earnings and giving the jury instructions as to the non-taxable nature of compensation for damages. *Hall v. Chicago & N.W.Ry.*, 5 Ill.2d 135, 125 N.E.2d 77 (1955); *Raines v. N.Y. Central R.R.*, 51 Ill.2d 428, 283 N.E.2d 230, *cert. denied*, 409 U.S. 983, 93 S.Ct. 322, 34 L.Ed.2d 247 (1972). Currently, Illinois follows *Liepelt* in FELA actions. *Crabtree v. St. Louis-San Francisco Ry.*, 89 Ill.App.3d 35, 44 Ill.Dec. 113, 411 N.E.2d 19 (1980); *Oltersdorf v. Chesapeake & Ohio Ry.*, 83 Ill.App.3d 457, 38 Ill.Dec. 896, 404 N.E.2d 320 (1980). No Illinois cases, either before or after *Liepelt*, have decided these issues in non-FELA actions. The Illinois Appellate Court determined in a pre-*Liepelt* decision that the defendant had not preserved the evidentiary issue for appeal. *Peluso v. Singer General Precision, Inc.*, 47 Ill.App.3d 842, 8 Ill.Dec. 152, 365 N.E.2d 390 (1977). (The defendants in *Peluso* did not seek jury instructions on the taxation of damage awards.) In *dictum*, the *Peluso* court noted that FELA cases are not controlling where the issue arises under the state Wrongful Death statute. 365 N.E.2d at 399. In a concurring opinion in *Peluso*, Judge Sullivan considered the merits, and would have permitted the defendants to establish the fact that the plaintiff's expert witness did not include income taxes in his estimate of the plaintiff's lost future earnings. 365 N.E.2d at 401-04. In *Yakstis v. William J. Diestelhorst Co.*, 61 Ill.App.3d 833, 19 Ill. Dec. 90, 378 N.E.2d 591 (1978), the Illinois Appellate Court stated that "the [decedent's] tax return was relevant evidence of the economic status of the decedent, and would tend to show the economic loss caused by his

death." However, the plaintiff, rather than the defendant, introduced into evidence the decedent's tax return in *Yakstis*. 378 N.E.2d 596.[5] *Yakstis*, of course, was decided before *Liepelt*, yet its brief discussion of the relevance of the decedent's tax return to the economic loss which his survivors suffered as a result of his death does not mention *Hall*, *Raines*, or any of the other pre-*Liepelt* Illinois cases which held such evidence inadmissible when offered by the defendants.

Neither the Illinois Appellate Court's post-*Liepelt* decisions, nor its opinion in *Yakstis*, nor Judge Sullivan's concurring opinion in *Peluso*, provide much guidance as to whether the Illinois Supreme Court would apply the holdings of *Liepelt* to actions arising under the Wrongful Death Act. In the absence of definitive state authority, a federal court sitting in diversity jurisdiction must endeavor to interpret state law in the manner in which the Supreme Court of the state would interpret it if faced with the same issue. *Huff v. White Motor Corp.*, 565 F.2d 104, 106 (7th Cir. 1977); *Hartford v. Gibbons & Reed Co.*, 617 F.2d 567, 569 (10th Cir. 1980); *Bearce v. United States*, 433 F.Supp. 549, 552 (N.D.Ill. 1977).

In doing so, the federal court should consider all the data—including compelling inferences, logical implications from other related adjudications, and considered pronouncements—which the highest court of the state would consider. *Huff*, 565 F.2d at 106; *Bearce*, 433 F.Supp. at 552. In the absence of other authority, we take the Illinois Supreme Court's decisions in *Hall* and *Raines*, *supra*, although overruled by *Liepelt* insofar as

[5] The plaintiff's reasons for introducing the decedent's tax return into evidence in *Yakstis* are not clear from the Illinois Appellate Court's opinion. The decedent was self-employed as a truck driver. 378 N.E.2d at 593. That his tax return was the only evidence of the decedent's earnings would appear to be a logical inference from the nature of his employment and the defendant's objection to its admission into evidence.

they governed FELA actions, as expressing the position of the Illinois courts on these issues in actions arising under the state Wrongful Death statute. Our interpretation of Illinois law on these issues is necessarily somewhat speculative. Indeed, having to rely upon overruled cases as evidence of how another court would likely rule on issues if they arose in a different posture strikes us as only slightly more reliable than predictions of the future arrived at by reading the entrails of sheep. But we believe our interpretation is further supported by the absence of any reference to taxation in the Illinois Pattern Instructions on damages for wrongful death and the uniform practice in the state trial courts. The defendants have not been able to point to a single case in which an Illinois court, in an action brought under the state's Wrongful Death Act, granted what they seek here.

*Estate of Spinosa*, 621 F.2d 1154, 1158 (1st Cir. 1980), presented a similar instance of uncertainty as to whether the applicable state law admitted evidence on the impact that taxes would have on a decedent's future earnings. The First Circuit held in *Spinosa* that in the absence of New Hampshire case law on the issue, the district court's refusal to admit the evidence, relying on the "majority rule" that such evidence is inadmissible, *see* Annot., 63 A.L.R.2d 1393 & updates, was proper.

Although neither federal nor Illinois law is unambiguous as to the issues that the parties raise, the most logical and likely conclusion is that federal law, if free from constraints imposed in diversity jurisdiction, would admit evidence and give an instruction as to taxation and damage awards, while Illinois law precludes both admission of this evidence and the giving of an instruction. We therefore turn to the question of which law we must apply.

II.

A federal court sitting in diversity should apply the substantive law of the state in which it sits. *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Additionally, Illinois law is to be applied to substantive questions in this litigation when the decedent and the plaintiff were and are domiciliaries of Illinois. *In re Air Crash Disaster Near Chicago*, 644 F.2d 633, 637 (7th Cir. 1981). *Erie* does not, however, require application of state law in matters of evidence and procedure. *Hanna v. Plumer*, 380 U.S. 460, 464-74, 85 S.Ct. 1136, 1140-45, 14 L.Ed.2d 8 (1965).

Defendants argue that evidence and instructions on taxation, rather than pertaining substantively to the measure of damages, are procedural. We do not believe that an analysis based on the "substantive-procedural" dichotomy resolves the question whether we must apply federal or state law. To ask whether an issue is "substantive" or "procedural" disposes of the ultimate question of whether federal or state law applies only when it is clear that the issue is either substantive or procedural. To limit analysis to application of the substantive-procedural dichotomy is not helpful when confronted with "matters, falling within the uncertain area between substance and procedure, [that] are rationally capable of classification as either." *Hanna v. Plumer*, 380 U.S. 460, 472, 85 S.Ct. 1136, 1144, 14 L.Ed.2d 8 (1965). Indeed, the Supreme Court has repeatedly recognized that "[t]he line between 'substance' and 'procedure' shifts as the legal context changes. 'Each implies different variables depending upon the particular problem for which it is used.'" *Hanna*, 380 U.S. at 471, 85 S.Ct. at 1144, *quoting Guaranty Trust v. York*, 326 U.S. 99, 108, 65 S.Ct. 1464, 1469, 89 L.Ed. 2079 (1945).

In general, the admissibility of evidence and the giving of cautionary instructions are procedural matters and hence the law of the forum applies to them. There is no question that the form in which defendants would have the decedent's financial status established

and the manner in which the defendants would have a jury calculate its damages award have procedural aspects. But it is just as logical to view the manner in which this evidence is introduced and the instructions as to the importance that the jury should give this evidence as affecting the measure of damages and hence substantive in nature. Whether we admit or exclude this evidence, and whether we give or do not give this instruction, will materially affect the amount of the jury's award. We do not conclude that defendants' characterization of these issues as "procedural" is necessarily inaccurate, and that these issues are wholly "substantive." The point is that these issues are both substantive *and* procedural, and we see no rational basis for concluding that either of them leans toward one rather than the other label.

Instead, our decision that the issues raised by the parties' motions *in limine* are to be resolved by application of Illinois law rests upon the "realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court." *Hanna*, 380 U.S. at 467, 85 S.Ct. at 1141. That *Erie*'s policies of discouraging forum-shopping and avoiding inequitable administration of the laws serve as a better touchstone than does a simple "substantive-procedural" dichotomy is persuasively demonstrated in the First Circuit's opinion in *Turcotte v. Ford Motor Co.*, 494 F.2d 173 (1974). In *Turcotte*, the court rejected plaintiff's contention that federal law governed the admissibility of the effect of income taxes on earnings in a diversity wrongful death action where the applicable state law permitted consideration of income tax returns. It therefore determined that *Erie* required application of the state law. The court noted that the concern of *Erie* and its progeny was both to discourage forum-shopping and to avoid inequitable administration of the laws. Therefore, it concluded, application of the law which would be applied in the state court was required.

> [I]f Rhode Island law required evidence of income taxes in computing wrongful death damages, yet the federal district court in Rhode Island barred such evidence in diversity cases, no rational plaintiff who had the choice would ever bring a wrongful death action in the state courts. The difference in wrongful death recoveries between the two forums would be staggering.

*Id.* at 185.

The converse is also true. If Illinois does not admit such evidence, its admission in the federal court, particularly where only state law may be otherwise applied, would promote "inequitable administration of the laws."

We think it important to emphasize what we have not done in ruling upon these motions *in limine*. We have not, as a federal court sitting in diversity, decided whether it would be desirable to admit evidence of the effect of taxation upon earnings or to give some instruction to the jury as to the tax status of compensation for damages or how taxation should affect the calculation of damages. Nor would it be proper for us to do so. *Erie, supra.* The competing policy considerations have been analyzed in detail by various courts and commentators, *see, e.g., Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980) and 444 U.S. at 498, 100 S.Ct. at 759 (Blackmun, J., dissenting); *Domeracki v. Humble Oil & Refining Co.*, 443 F.2d 1245 (3d Cir.), *cert. denied*, 404 U.S. 883, 92 S.Ct. 212, 30 L.Ed.2d 165 (1971); *McWeeney v. N.Y., N.H. & Hartford R.R.*, 282 F.2d 34 (2d Cir. 1960); *Huddell v. Levin*, 395 F.Supp. 64 (D.N.J. 1975); D. Dobbs, Remedies 575-79 (1973); Nordstrom, *Income Taxes And Personal Injury Awards*, 19 Ohio St. L.J. 212 (1958), and we see no reason to add unnecessarily to the girth of some future volume of the Federal Supplement by repeating them here. Under present law, the decision is one either for the Illinois legislature and the Illinois courts or the Congress of the United States rather than for us. Our decision is limited to a finding that Illinois law and federal law would resolve these issues differ-

ently, and that the principles first enunciated in *Erie* require us to apply Illinois law.

We are constrained to observe once again that the result of the application of state law in aviation disaster cases is inevitably to create substantial disparity in the applicable law depending on the particular state or federal court in which the case is filed or tried. The crash here involved is typical. Residents of a number of states and foreign countries were passengers. Their survivors are also residents of a number of jurisdictions, not necessarily the same as the decedents. Cases have been filed in various state and federal courts. The federal cases have all been transferred to us under 28 U.S.C. § 1407. As discovery is completed, if the parties so desire, we have remanded a number of cases to the transferor courts for trial. Those cases originally filed in this district will, of course, remain here. As this opinion indicates, whether evidence and instructions with respect to federal and state income taxes will be permitted depends on the applicable state law. As is obvious, this will result in substantial differences in the damage calculations in the various cases.

We have previously urged the enactment of a federal aviation disaster law which would make uniform the legal principles applicable in aviation disaster cases. It is unjust as well as ludicrous that such issues as the standard of liability (no-fault, comparative negligence, contributory negligence), the measure of damages, whether or not prejudgment interest is an element of damages, whether or not damages for pain and suffering are recoverable, whether or not punitive damages are recoverable, whether or not federal and state income taxes should be considered in determining damages, the applicable statute of limitations and a host of other important issues should vary from case to case arising out of the same disaster depending on the vagaries of the applicable state law.

Even the determination under conflicts of law principles of what is the applicable state law presents com-

plex questions and results in an unnecessary burden on the courts as the earlier opinions of this Court and the court of appeals on the issue of punitive damages demonstrate. We and the court of appeals have also had to consider and determine whether or not prejudgment interest is a proper element of damages and, it is obvious, we and the court of appeals will also have considered the income tax questions dealt with in this opinion. All of the foregoing would be obviated by the enactment of a federal aviation disaster statute. Both the best interests of justice to the affected parties and of a sensible utilization of judicial resources would be served by such a statute.

Plaintiff and both defendants have requested certification under 28 U.S.C. § 1292(b) of our order as to these issues. Section 1292(b) provides for immediate appeal of an otherwise nonappealable interlocutory order which the district court and the court of appeals determine (1) involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Certification under section 1292(b) is reserved for exceptional cases, *Seven-Up Co. v. O-So Grape Co.*, 179 F.Supp. 167 (S.D.Ill.1959), and was not intended as a means of expediting review merely because an order involves an important legal question. *Bobolakis v. Compania Panamena Maritima San Gerassimo*, 168 F. Supp. 236, 239 (S.D.N.Y. 1958); *see* 1958 U.S.Code Cong. & Adm. News 5260-61.

We agree that whether evidence on the effect of taxation upon earnings is admissible, and whether the jury must be instructed as to the taxability of damages, in an action in which federal jurisdiction is based upon diversity of citizenship, are issues to which "substantial ground for difference of opinion" exists. Earlier paragraphs of this opinion illustrate that whether Illinois or federal law applies to these issues requires an examination of whether they are more fairly characterized as

substantive or procedural. Our conclusion that both labels are apt recognizes that the issues might possibly be characterized as either substantive or procedural. We also noted that Illinois law on these issues is uncertain after *Liepelt*.

We also believe that these issues are "controlling issues of law," particularly since the only issue to be tried in all of these cases will be the issue of damages. Any decision on these issues will almost inevitably influence the amount of damages that the jury will award.

Moreover, any early appellate decision will enable at least the judges trying the cases in this district to know how to proceed with respect to evidence and instructions as to the income tax questions. In addition, it will obviate the need to re-try any such case if the Seventh Circuit were ultimately, after a trial, to reverse our decision on these issues. The substantial number of cases affected and the possibility that some will be transferred to other courts for trial increase the advantage of obtaining a final determination of these issues before trial.

We would hope that the court of appeals will expedite its ruling since a number of cases are ready for trial. The parties' motion for certification under 28 U.S.C. § 1292(b) will be granted with a recommendation for expedited consideration.

An order consistent with all of the foregoing will enter.

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